

**Before the
Federal Communications Commission
Washington, D.C. 20554**

March 6, 2017

In the Matter of)	
)	
Protecting the Privacy of Customers of)	WC Docket No. 16-106
Broadband and Other Telecommunications)	
Services)	
)	

Comments of FreedomWorks Foundation on Petitions for Reconsideration of Order

FreedomWorks Foundation is a 501(c)(3) nonprofit and educational foundation. Its mission is to educate citizens on, and to promote the adoption of, free-market policies, which it believes inure to the benefit of consumers and citizens generally. FreedomWorks Foundation is actively involved in a number of regulatory issues and has been particularly interested in technological advances and changes in the marketplace that bolster competition and consumer choice. We take a strong interest in the Federal Communications Commission's (FCC's) October 27, 2016 Rulemaking on "Protecting the Privacy of Customers of Broadband and Other Telecommunications Services," given the potential implications for competition and innovation in the technology sector. We are pleased to submit our comments on this issue and we encourage the FCC to reconsider the rule.

We believe that consumers are best served by uniform privacy standards, and in the absence of any indications of market failure, the thrust of the Commission's efforts should focus on adopting privacy standards within the framework previously established

by the Federal Trade Commission that establish uniform standards for the whole internet ecosystem.

FreedomWorks Foundation believes that maximizing consumer welfare is the principal criterion to be considered when evaluating market activity and regulatory interventions in such markets. This is a fundamental assumption in mainstream economic analysis, and our comments focus on the need for the appropriate cost-benefit analysis in order to avoid unnecessary regulatory barriers in one of the most fast-paced sectors of the economy. With respect to this proceeding, FreedomWorks Foundation recommends that the Federal Communications Commission withdraw the rule and undertake a more comprehensive cost-benefit analysis prior to issuing any rules on privacy.

The FCC should conduct an analysis comparing how the FCC's policies differ from the original privacy framework established by the FTC, along with an estimate of the differences in both cost and benefits from the new privacy rules. This should include a clear identification of the potential market failure as well as a cost-benefit analysis that identifies the least cost method of addressing any market imperfections that have been demonstrated. Absent clear benefits, the FCC should work with the FTC on comprehensive privacy rules for the entire internet ecosystem, rather than adopting new rules for one subsector.

The recent rule on privacy results from the FCC's Open Internet Order, released in 2015.¹ As a result of reclassifying broadband internet access service (BIAS) as a common carrier, the Federal Trade Commission (FTC) no longer has jurisdiction to impose privacy rules on internet service providers. Instead, as a common carrier

¹ Available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf

regulated under Title II of the Communications Act, privacy regulation reverts back to the FCC, primarily under Section 222 of that Act, which governs the use and disclosure of Customer Proprietary Network Information (CPNI).

In preparing the privacy rules for BIAS providers, the FCC began with a series of premises: “*First*, consumers must be able to protect their privacy, which requires transparency, choice, and data security. *Second*, ISPs are the most important and extensive conduits of consumer information and thus have access to very sensitive and very personal information that could threaten a person’s financial security, reveal embarrassing or even harmful details of medical history, or disclose to prying eyes the intimate details of interests, physical presence, or fears.”² The third premise notes that there is a gap in the application of federal privacy protections when it comes to BIAS providers, and this NPRM seeks to fill that gap.

However, the FCC rule addresses BIAS providers specifically, leaving Edge Service Providers (ESPs) under a different regime established by the FTC. This model of dual enforcement unnecessarily complicates privacy rules and does not necessarily improve transparency, nor establish consumer choice, or improved data privacy. To the contrary, establishing independent privacy regimes for different parts of the internet ecosystem may actually confuse consumers and increase prices without generating improved data privacy. The new rule is also a departure from the well-established framework created by the FTC that seeks to balance privacy and innovation.³

More importantly, it is not intuitively obvious that the second premise is, in fact, accurate in today’s broadband market. For example, a recent study by Peter Swire, Justin

² *Federal Register*, vol. 81, no. 76, pp. 23360-23361.

³ Federal Trade Commission Privacy Report, available at <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/ftc-privacy-report>.

Hemmings, and Alana Kirkland suggests that usage patterns and spreading encryption practices are limiting the information to which ISPs have access.⁴ Specifically, Swire et al. find that encryption is rapidly becoming the communication standard for the internet, with 70 percent of traffic estimated to be encrypted at the end of 2016.⁵ At the same time, most individuals access the web from several different points over the course of the day, unlike earlier web usage where most users had access from a single desktop connection at home. Finally, the rise of proxy servers and virtual private networks demonstrate market-based response to concerns over privacy. Taken together, these trends significantly reduce the availability of unencrypted sensitive information accessed by BIAS providers. If this is the case, new provider-specific privacy rules are unwarranted at this time.

Moreover, while BIAS providers' access to unsecured information is diminishing, the amount of sensitive information available to ESPs has increased considerably. Swire et al. note that, due to both cross-context tracking and cross-device tracking, ESPs have access to far more sensitive and commercially valuable information than BIAS providers.⁶ In fact, the authors conclude, "In summary, based on a factual analysis of today's internet ecosystem in the United States, ISPs have neither comprehensive nor unique access to information about online users' activity. Rather, the most commercially valuable information about online users, which can be used for targeted advertising and other purposes, is coming from other contexts, such as social networks and search."⁷

⁴ Peter Swire, Justin Hemmings, and Aaron Kirkland, *Online Privacy and ISPs: ISP Access to Consumer Data Is Limited and Often Less Than Access By Others*, Institute for Information Security and Privacy at Georgia Tech, available at <http://www.iisp.gatech.edu/working-paper-online-privacy-and-isps>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

This raises questions about a significant new rule exclusively targeting BIAS providers. The FCC's rule creates a dichotomy with respect to privacy protection based on business function that does not necessarily enhance consumer privacy in the internet ecosystem. Traditionally, under the auspices of the Federal Trade Commission, privacy protections were viewed in a more uniform manner, with broader goals and a more comprehensive approach to consumer protection. The new rule adopted by the FCC fails to take into account these negative market effects that disproportionately harm BIAS providers. Additionally, FreedomWorks Foundation believes that the new rules specific to BIAS providers alone can be confusing for consumers without enhancing privacy protections, and that a better strategy would be to work with the FTC to establish a more cohesive approach to questions of privacy that guides all who deal with sensitive information, regardless of where in the internet ecosystem they reside.

To better evaluate the impact of the recent rule on BIAS providers, the FCC should rely on the guidelines for regulatory analysis laid out in OMB Circular A-4.⁸ Very briefly, these guidelines provide the basic steps for regulatory analysis to ensure that any regulation addresses a specific problem in the most effective manner. First, the problem to be addressed must be clearly identified, and any information about the need for federal action and the potential consequences of that action should be provided. Second, the FCC should conduct a regulatory analysis of the rule to demonstrate the benefits of the rule exceed the costs imposed on consumers and the economy. Third, FCC should identify and adopt the least costly approach to resolving the problem, comparing among alternative approaches and adopting the low cost solution. The circular provides more

⁸ Office of Management and Budget, Circular A-4, "Regulatory Analysis," September 17, 2003, available at https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

details on regulatory analysis, but these three points are the crux of the analysis. Proper analysis may demonstrate that the existing FTC framework provides the most efficacious approach for protecting consumer privacy.

Further, under the Regulatory Flexibility Act, the FCC is required to evaluate the impact of the rule on small business. For small BIAS providers, the costs of compliance could be significant, and it is incumbent upon the Commission to evaluate this regulatory burden. It is important to determine if the rule may have the unintended consequence of reducing competition by eliminating smaller BIAS providers who find the new rules cost-prohibitive.

The FCC refers to the reclassification of broadband services as common carriers and the FTC's subsequent loss of authority to regulate privacy of BIAS providers as the reason this rule was required. While this void clearly triggered the rule on privacy, it is also useful in regulatory analysis to establish a baseline in order to more carefully evaluate the potential impact of the regulation.

In this case, the baseline should be the existing privacy framework created by the FTC and the administration. Such a baseline would assist in identifying the scope of the problem and any potential need for additional regulation. Yet, with respect to the recent privacy rule, the FCC's implicit baseline is its premise that ISPs have access to more sensitive data than actors elsewhere in the internet ecosystem. However, no empirical evidence is provided to demonstrate that this is the case. At the same time, others assert that ESPs are in a much stronger position to access and exploit sensitive information. The FCC needs to provide a more thorough regulatory analysis that ensures that its baseline for this rule was correctly defined. If, in fact, the analysis finds that ESPs enjoy

greater access to sensitive information, then the new mandate for BIAS providers may not significantly improve consumer welfare and, thus, should be withdrawn. Lower cost alternatives for addressing the gap created by the reclassification of broadband providers as Title II common carriers should be adopted within the existing privacy framework established by the FTC.

The FTC relies on a more nuanced approach to privacy, creating a baseline that outlaws deception and unfairness with respect to the use of private information. However, beyond these fundamental concerns, the agency recognizes that information is a good and that there is a wide array of preferences for privacy among consumers. As a result, it relies on a more market-based approach to data use. As FTC Commissioner Maureen Olhausen notes, “At the FTC, our privacy approach respects the autonomy of all consumers, including those with different privacy preferences than ourselves. As such, it seeks to enable consumers to match their privacy preferences with a company’s privacy practices. In pursuit of this goal, the FTC protects privacy with a two pronged approach, seeking to prevent both deception and unfairness.”⁹ This provides basic protections for consumers while allowing them flexibility in the use of their private information.

It must be remembered that information is an important economic good, and different consumers have different perspectives on the use of that information. The internet is changing, and there may be even different uses for this information in the future. The possibilities for using information for innovation, customization, and competition are great, and users should not have these options taken from them if they are not causing harm. Absent deceptive or unfair practices, consumers should have as much

⁹ FTC Commissioner Maureen Olhausen, Remarks at the George Mason University School of Law, “Public Policy Briefing on Privacy Regulation after Net Neutrality,” March 30, 2016, available at https://www.ftc.gov/system/files/documents/public_statements/942823/160331gmuspeech1.pdf .

flexibility as possible when determining the use of such information. Yet the FCC's adoption of an opt-in standard for BIAS providers restricts consumer choice in ways that may also increase costs.

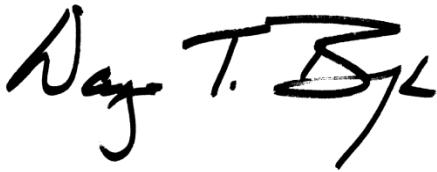
The potential increase in pricing is also attributable to the two-sided nature of the market. Jean-Charles Rochet and Jean Tirole describe the operations of a two-sided market: "More generally, many if not most markets with network externalities are characterized by the presence of two distinct sides whose ultimate benefit stems from interacting through a common platform. Platform owners or sponsors in these industries must address the celebrated 'chicken-and-egg problem' and be careful to 'get both sides on board.'" ¹⁰ There is a distinction between the overall optimal pricing structure and the allocation of prices; it is the difficult task of the platform operator (in this case, the BIAS provider) to allocate prices across both sides of the market in order to generate the optimal outcome.

BIAS providers allow consumers access to content providers on the web, and the costs of such access is split between the groups on either side of the market. The 2015 *Open Internet Order* already introduced new restrictions on pricing that make setting the optimal price more challenging. Regulating the flow of information through opt-in requirements in this privacy rule adds further restrictions that potentially eliminate certain transactions by creating more limited options on how consumer information can be used. As a result, consumers may be vulnerable to higher costs as BIAS providers seek to recoup their costs elsewhere.

¹⁰ See John-Charles Rochet and Jean Tirole, "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association*, June 2003, 1(4): 990-1029.

While privacy is an important issue for internet users, new restrictions on the use of personal data and opt-in requirements for specific segments of the internet ecosystem is not the only solution. Rather than establish costly new requirements for one segment of the internet ecosystem, FreedomWorks Foundation believes the FCC should strive to adopt uniform standards for all that continue to provide consumers flexibility with respect to how they choose to use their personal information. The FCC should work with FTC and others to develop a more comprehensive privacy policy that works for all stakeholders. For these reasons, FreedomWorks Foundation respectfully recommends that the FCC withdraw its October 27, 2016 privacy rules adopted in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, reading "Wayne T. Brough". The signature is stylized, with the first name "Way" written in a cursive-like script, followed by "T." and a large, bold "B" that extends into a long horizontal stroke.

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